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VIRGINIA LAW REGISTER

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Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

Trial by Jury in the Federal Courts in Condemnation Proceedings.

A very interesting question arose in the case of U. S. *v.* Paul Beatty involving the right of a party whose land is sought to be condemned by the United States, to demand a jury. In this case, which originated in the District Court of the United States for the Western District of Virginia, the United States sought to condemn Beatty's land in Warren County. The proceedings were initiated under the direction of the Attorney General praying for the appointment of commissioners to ascertain the just compensation to be paid, and regular proceedings were had under the Virginia Statute.

The Attorney General claimed to do this by virtue of § 2 of the Act of August 1888 (25 Stat. at L. 357) which is as follows:

> "Sec. 2. The practice, pleadings, forms, and modes of proceeding in causes arising under the provisions of this act, shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

Regular proceedings were had under the terms of our Virginia Statute, which is as follows, as far as it is necessary to quote:

> "Any company *heretofore or hereafter chartered by this State,* which is authorized by its charter or the laws of this State to condemn land or other property, or any interest or estate therein, for its uses, which cannot, because of the incapacity of the owner, or any one of them, or inability to agree upon the price or terms," etc.

The commissioners fixed the damages at $30,000, and the report after exceptions to it were overruled was confined by the Federal Court. The owner appealed to the Circuit Court of Ap-

peals and that Court held that under the 7th Amendment to the Constitution of the United States preserving the right of trial by jury, the owner was entitled to a jury, and reversed the case with instructions to the lower court to have a jury to fix the compensation 122 C. C. C. A. 16, 203 Fed. 620. The United States then asked for an appeal, or if that be considered premature, that the judgment of the Court might be reviewed upon a writ of certiorari. That Court held that the judgment was not final, and that it could not entertain an appeal under § 128 or § 241, Rev. Stats., or award the writ under § 240, unless the case was such as could come before the Court under § 241. So it dismissed the writ of error and refused the petition for certiorari. U. S. *v.* Beatty, decided Feb. 24th, 1914. Advanced Opinions U. S. S. C., Apl. 1st, 1914, p. 392.

The case was very ably argued by D. C. O'Flaherty, E. Hilton Jackson and E. H. Jackson, and a perusal of their brief seems to leave no doubt about the matter. For it would seem almost unquestionable that no application to condemn land in this State can be made by any other person than a "company" heretofore or hereafter chartered by this State, which is authorized by its charter or the laws of this State "to condemn land, etc." The United States Government is in no possible way a company at any time chartered by this State, so any proceedings it may take must be taken by virtue of and in conformity with the Federal Statutes, limited only by the provisions of the Constitution of the United States. Indeed the United States Supreme Court in Luxton *v.* North River Bridge Co., 147 U. S. 337, has said in speaking of this question of conforming to the State practice, "It must give way whenever to adopt the State practice would be inconsistent with the terms, defeat the purpose or impair the effect of any legislation of Congress."

Necessarily, therefore the United States in this State is compelled to proceed under its own statutes.

Strange to say the Supreme Court of the United States has never had before it a case in which the right to a jury trial in condemnation proceedings where they originated directly in the Federal Courts, have been called in question, except in one case—Chappell *v.* U. S., 1660, 499, and in that case there was a jury of twelve men summoned specially to try the case. The

"condemnee" insisted he had a right to have his case tried by the regular term jury, but the Supreme Court held that he had the benefit of a trial by an ordinary jury at the bar of the Court and that was sufficient. Every other case was a "removed case" and in such cases the Court has sustained the *State* law on the subject, which of course was correct. U. S. *v.* Jones, 109 U. S. 513; Luxton *v.* North River Bridge Co., 147 U. S. 337; Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. p. 685; Shoemaker *v.* U. S., 147 U. S., p. 282; Bauman *v.* Ross, 167 U. S. 548. In the first case the only question before the Court was whether the United States could use a state tribunal for condemnation proceedings. In the last case there was nothing asserted or argued that called for a ruling that no jury of any kind was requisite, or that the party was entitled to a jury of twelve men. There was in that case a jury of seven under the Act of March 2nd, 1893, and the condemnation proceedings were in the District of Columbia.

In the case of Secombe *v.* Railway Company, 23 Wall. 108, the Court says:

> "It is no longer an open question in this country that the mode of exercising the right of eminent domain, *in the absence of any provision in the organic law prescribing a contrary course,* is within the discretion of the legislature."

It therefore follows from this language that if there is anything in the *organic law* which requires a jury trial in a suit at law, a jury trial must be had; for it has been repeatedly decided that a condemnation proceeding is a "suit at common law." Kohl *v.* U. S., 91 U. S. 367; Chappell *v.* U. S., 160 U. S. 499; Upshur Co. *v.* Rich, 135 U. S. 467.

It is to be regretted that the Supreme Court of the United States did not pass directly upon this question in the Beatty case. We have been informed that at the argument of the case Chief Justice White remarked that they would hear the case as if the writ of certiorari had been granted and determine the question of granting the writ later. The case was accordingly argued in full, but the Court "dodged," if we may use such language about that sublime tribunal. It is a pity that so much time and money will have to be wasted to get the case back into the Court. To the ordinary mind it looks as if this could be spared, especially

in view of the fact that it takes from two to three years to reach argument in the Supreme Court. The ultimate result we think is not hard to determine. The Supreme Court of the United States has always shown a decided leaning towards enforcing the 7th Amendment to the extreme limit. As late as March 9th of the present year the Court has held that a Federal Circuit Court of Appeals denied the right of trial by jury guaranteed by the Federal Constitution whereupon reversing a judgment of the district court entered as a general verdict in favor of the plaintiff, because of the opinion that the evidence did not justify the submission of the case to the jury, it directs in accordance with the State (Pennsylvania) practice that judgment be entered for the defendant. Yancy *v.* C. R. R. of N. J., Advance Sheets, U. S. S. S. C. Opinion No. 10, p. 481. This was but affirming the principles laid down in Slocum *v.* N. Y. Life Ins. Co., 228 U. S. p. 364.

Contempts.

On opposite sides of the same newspaper we found the other day two very interesting decisions on the subject of contempt. One was in Mr. Justice Seabury's Court in New York City, where three persons connected with *The Globe* newspaper—the editor, city editor and a reporter—were each fined $250—the maximum—for premature publication in the *Globe* of an advance copy of District Attorney Whitman's opening address to the jury in the Becker case. Whilst thoroughly agreeing in the eminent propriety of these fines, we think their value to the public and to the course of justice would have been very much enhanced by inposing a similar fine on the District Attorney for allowing his speech to get out of his hands before it was delivered. He was certainly *particeps criminis*. The *Globe* not only published the speech a day before it was delivered but also graphically described Becker's appearance during its delivery and the way in which his wife bit her lips as if to prevent crying out a protest, and the way she leaned over and made bitter comments on the way things were going. All this, of course, pure imagination. We cannot forbear quoting the language of the learned Judge, and in addition calling the attention of those keenly interested in the cause of justice

to the inadequate way in which the courts in this State and those standing at their bar are protected from the assaults of the "yellow press." Men and women are tried and convicted by penny-a-liners, regardless of anything beyond their ten dollars a column, before they are indicted by a grand jury. Allegations—often absolutely without the slightest basis of fact—are made; damning "evidence" is displayed in huge headlines and though proven afterwards to be false, no correction is made; the public mind is warped, prejudiced, inflamed and the accused is invited to "prove his innocence," instead of standing innocent until convicted. Mr. Justice Seabury said:

> "Judicial proceedings in the courts of this county are persistently misrepresented in the public press, and the administration of justice is thereby embarrassed and impeded. The power of the courts in this State to protect the administration of justice from this abuse is very limited. In England, Massachusetts, and New Jersey, and in some of the other States, the courts are clothed with ample power to correct such abuse. The courts of this State, however, have conferred upon them power to punish as contempt the publication of a false and grossly inaccurate account of its proceedings. The publication in question is clearly of good character. Not only was the address of the District Attorney not delivered, but the alleged description of the effect of the address upon the defendant and his wife shows the utter disregard of truth which actuated those responsible for its publication and the reckless manner in which so-called 'news' is manufactured.
>
> "Under the circumstances, I feel that I have no right to ignore this offense. To do so would reflect upon the administration of justice. While I do not wish to act harshly, or to humiliate by imprisonment those responsible for this contempt, I do feel that the punishment to be imposed should be sufficient to emphasize the reprehensible character of the act and to serve as a warning in the future which may deter others from repeating it. I shall impose the maximum fine which the law permits."

In Virginia no power is conferred upon the courts by statute to punish any publication, no matter how grossly inaccurate, misleading or reckless, though we suppose that under the ruling in Patterson *v.* Colorado, 205 U. S. 454, our Virginia Courts would have the right independently of any statute. The necessity of some such power is rendered more important by the fact that

juries are allowed to read newspapers during the course of a criminal trial, even though those papers have inflamed headlines, partial statements of evidence, and very often severe comments upon counsel and witnesses. It is true that in McCue's case, 103 Va. 1066, our own court has held it a bad practice and unsafe to allow juries to have access to papers during the progress of a criminal trial, but they did not in express terms condemn it. They did not pass expressly upon the question because it was rendered unnecessary by the fact that counsel for the prisoner were informed during the progress of the trial in open court that the jury had access to the papers and did not object until after the verdict.

In England, as we have once or twice noted, the courts stretch their power in this respect to an extent almost inconceivable in this country. In Birmingham the Recorder, in referring to a photograph published in a local paper of several prisoners in the dock and counsel defending them, said it was a monstrous and outrageous thing to publish such photographs and besides a serious contempt of court. It was also unfair to the prisoners, and if he could find out who took the photograph he would punish him severely. Within the last few months, in the Divisional Court in London, the Court made the *Pall Mall Gazette* pay the whole costs of contempt proceedings (no small sum) because the headlines in that newspaper were so framed as to probably interfere with the course of justice, although there was nothing in the printed matter to which the headline referred which could afford sufficient ground for complaint. The paper had grouped together the headlines relating to a writ in chancery issued by shareholders against the managing director of the Marconi Company (for libelling whom Mr. Cecil Chesterton was then undergoing his trial) with the other directors in respect of certain dealings with American shares in which the company was interested and the headlines referred to the criminal trial.

Isn't it about time something should be done to check this method of procedure? We have had—are having now—a good deal of newspaper "detective work" and blazing forth of damning statements against a person in this state accused of a hideous crime. She may be guilty, but in all simple justice should the public mind be so prejudiced against her that a fair and impartial

jury will be hard to be obtained? Lynch law is universally condemned by all right thinking people—Is trial and conviction by reporters and newspapers any better?

Criminal Contempt.

At last the celebrated case of Gompers *v.* Buck Stove Co. in its "contemptible" aspect is disposed of. It has been before the Supreme Court of the United States several times and in the last case has been argued and re-argued. The Supreme Court of the United States holds that the contempt of these labor men, who deliberately violated an injunction of Judge Wright's amounted to a crime, and that over three years having elapsed from the date of the commission of the offence, they had to be discharged because of the statute of the United States providing that unless "the indictment is found, or the information is instituted within three years" the accused cannot be tried.

It will be recalled that in 221 U. S. 418 this same case was before the court and the lower court was reversed because the contempt was held in that case to be a civil contempt and not criminal, and although the court—Justice Lamar delivering the opinion—severely condemned the action of Gompers, etc., they reversed the lower court because that court treated the contempt as criminal, when it should have treated it as civil. It is rather curious to compare the two opinions in these two cases. In the case in 221 U. S. the court says: "Contempts are neither wholly civil nor altogether criminal. And it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." In the present case the court seems to hold that *all* contempt is criminal and rather indicates that it is an indictable offence punished by the usual criminal procedure and that a trial by jury is proper. Of course if this view that contempt is a crime is correct we do not see how the court could fail to apply the terms of the 7th Amendment to the Constitution of the United States in all proceedings against persons for contempt in courts of the United States. It is a great pity that poor old Shipp, the Tennessee sheriff, could not have anticipated this decision and asked for a jury trial in the case of the United States against him in

the celebrated case of U. S. *v.* Shipp, 214 U. S. 386. It will be remembered that Shipp as sheriff had charge of a negro prisoner who had been convicted of a rape. He took the usual appeal to the Supreme Court of the United States which the late Justice Harlan generally allowed in all negro cases of this character, and a mob broke into jail while the appeal was pending and hung the prisoner. Shipp was imprisoned by the court, Peckham, White and McKenna, JJ., dissenting. No one who reads Judge Peckham's dissenting opinion, in which the present Chief Justice and McKenna, J., concurred, can fail to be convinced that Shipp would have been acquitted by the jury.

General Laws Enacted at the 1912 Session of the Virginia General Assembly.

Out of the mass of "private" acts—i. e., acts which do not affect the State at large—we segregate below a list of those which appear to us of special general interest. Of course there are many acts relating to schools, taxes, etc., which we do not include in this list.

P. 20. Will be found the so-called "Enabling Act."

P. 21. In reference to safety appliances in shops and manufacturing establishments, lights, etc., giving additional powers to the Commissioner of Labor.

P. 27. Dog taxes and how collected. Giving a right to levy for same.

P. 28. The Act relating to judgment by Notice and Motion. Printed in full in our May number.

P. 29. Publication in Divorce Suits.

P. 30. Punishing profane swearing and drunkenness.

P. 30. The oath of Executors and Administrators.

P. 44. As to warrants for small claims before justices and how a justice may associate other justices with him.

P. 60. Pensioning retiring judges of our Supreme Court. A most proper and just act.

P. 78, 79. Two acts in relation to redress against erroneous assessments.

P. 69. Amending the Act relating to the method of obtaining a license to practice law.

P. 154. Allowing Evidence to be taken *ore tenus* at the discretion of the Court in Divorce cases.

P. 183. Amending § 46 of Act 4, State Constitution, permitting longer sessions of the General Assembly. An amendment which we sincerely hope will become law.

P. 184. Amending § 50 of Article 4. We are not so certain of the wisdom of this amendment.

P. 186. Repealing the Act as to the effect as evidence to be given deeds recorded prior to 1865.

P. 212. Adding to the *multa* taught in our public schools by providing that the children shall be taught for at least *30* minutes *in each month* how to prevent accidents. Comment impossible owing to the Act to be found on p. 30 as to profane swearing. Poor children! What next will they try to teach them? Thirty minutes a month could be better employed teaching them to spell.

P. 268. Prohibiting vagrancy amongst the dog population.

P. 303. Providing for a Legislative Reference Bureau. In our humble judgment one of the most valuable Acts passed at this session. The REGISTER has for many years earnestly urged the creation of such a bureau, or person to do the work the bureau is to do.

P. 305. Creating a State Forester. An excellent thing for the State.

P. 368. As to compensation of Supervisors.

P. 394. An Act making it a misdemeanor for any person over 18 to cause or encourage *a child* under 18 to commit a misdemeanor, or to send such a child to certain places or to cause such a child to be guilty of vicious or immoral conduct. An Act of doubtful value in that it will require a good deal of construction at the hands of the courts.

P. 414. An Act to validate certain gifts in the past or future for the benefit of education or charitable purposes. It seems to us this Act is exceedingly broad in its terms and may become a source of danger in the future.

P. 428. An Act providing additional remedies for the collection of taxes.

P. 485. Increasing the amount to be paid for the board of jurymen when the jury is kept together, and on same page an Act increasing allowance to jurymen. Both of these Acts are eminently proper.

P. 493. As to the right of a party who has amended his pleading in case where demurrer has been sustained, to object and except to the ruling of the court requiring the amendment. The party so amended is not to be considered as waiving his rights.

P. 498. Amending § 3729 so as to make it an offense to deface, injure or destroy any monument erected to mark the *site* of any engagement during the war between the States.

P. 511. Protecting a *bona fide* and without notice purchaser of real estate for value from an heir-at-law of a decedent against a devise of said real estate. The will must be probated in two years after testator's death. Usual saving as to person under disabilities.

P. 513. Primary Election Law.

P. 525. Amending the law as to Condemnation Proceedings. It is to be regretted that commissioners should not be allowed mileage in addition to the $3.00 per diem allowance made them. We have known several instances where good men refused to act because of the long distance they had to travel to inspect the property. It is often important that men at a distance from the property sought to be condemned should be chosen as commissioners, and the rate of compensation is not sufficient to justify them in serving.

P. 358. As to the powers of Boards of Supervisors.

P. 542. A very excellent Act as to admission to state hospitals of insane persons charged with or indicted for crime and for the examination by experts under order of the court of persons believed to be insane and so charged or indicted.

NOTE.—This list only includes Acts which have been published to May 20th (p. 608 of Acts 1914).